In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1005

SIERRA CLUB, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

In October 1968, the Secretary of the Interior completed an exchange of marshlands with two public utility companies, Toledo Edison Company and Cleveland Electric Illuminating Company, under 16 U.S.C. 668dd(b)(3). Under the agreement, the utility companies transferred to the United States, to become part of the Ottawa Federal Wildlife Refuge, a 480-acre tract of land in Ottawa County, Ohio, abutting on Lake Erie, and known as Darby Marsh. In exchange, the utilities received a nearby tract of land from the same Wildlife Refuge in Ottawa County, also bordering on Lake Erie, which was known as Navarre Marsh, and which consisted of 455 acres of marshland and an additional 77 acres in one corner of mostly upland.

The companies contemplated constructing on the dry portion of the land they acquired the Davis-Besse Nuclear Power Station.[1] They agreed to lease back to the United States, rent free for fifty years, the unused part of Navarre Marsh, or approximately the 455 acres of lowland, together with some adjacent property (to be leased for twenty-five years), and to install and maintain dikes and electric pumps in the area. As the court of appeals stated (Pet. App. 19a), "[u]pon completion of the exchange, the United States had a wildlife refuge of twice the number of acres it originally had (less the strips for canals and reserved rights)," in addition to other "improvements and benefits."

Two years after the land exchange became final, petitioners commenced an action in the United States District Court for the Northern District of Ohio, seeking to nullify the transaction as being contrary to the underlying statute (16 U.S.C. 668dd) and in violation of a treaty with Mexico, to enjoin construction of the Davis-Besse plant, and to obtain a declaration that 16 U.S.C. 668dd is unconstitutional. The district court (Green, J.) dismissed the complaint on grounds of sovereign immunity and of failure to state a claim on which relief could be granted (Pet. App. 2a-3a).

An amended complaint was then filed in the district court "which was a radical departure from [the] original complaint" (Pet. App. 17a). It contained a single cause of action challenging the Secretary of the Interior's transfer to the utility companies of title to Navarre Marsh as "an

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[1]Petitioners abandoned their efforts to enjoin construction of the power station in 1971, and we are advised that the companies have expended more than half the funds projected for construction and that the power station is over 40 percent completed.

arbitrary and capricious act" which "constitutes an abuse of discretion" (Pet. App. 17a). Without referring to the Darby Marsh exchange, the complaint sought an order directing the utilities to return Navarre Marsh to the United States.

The Secretary and the companies filed a motion to dismiss. The district court (Thomas, J.) granted the motion, holding that the action was barred by the doctrine of sovereign immunity, and involved a challenge to "'agency action * * * committed to agency discretion by law,' 5 U.S.C. § 701(a)(2)," which is "not reviewable under the Administrative Procedure Act" (Pet. App. 14a-15a). A divided court of appeals affirmed (Pet. App. 16a-41a).

Petitioners contend here, as they did below, that the present land exchange, consummated in 1968, should be partially set aside because the Secretary's decision to transfer Navarre Marsh, although authorized by 16 U.S.C. 668dd, was made in an arbitrary and capricious manner.[2] Both the district court and a majority of the court of appeals fully considered petitioners' arguments and determined that they were barred by the doctrine of sovereign immunity. For the reasons stated in those opinions, on which we rely, we submit that the court of appeals correctly held that (Pet. App. 26a-27a):

> Here the United States and the two utilities have owned, possessed and used for more than two years the lands which they respectively acquired by deeds of conveyance in the exchange. The District Court has no jurisdiction to undo and unravel the transaction.

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[2]Petitioners do not seek to divest the United States of title to Darby Marsh acquired in exchange for Navarre Marsh (Pet. App. 17a-18a).

We add only that the present land exchange transaction was consummated prior to enactment of the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, and thus was not subject to the requirement in that statute that an Environmental Impact Statement be prepared and filed considering the various ecological effects that might result from this federal action. See 42 U.S.C. 4332(C); and see *San Francisco Tomorrow* v. *Romney*, C.A. 9, No. 72-1969, decided January 18, 1973.[3] Since it is clear that future land exchanges of this magnitude under 16 U.S.C. 668dd will, by contrast, require the preparation of a NEPA statement which is subject to judicial scrutiny, the present case does not raise any issue of continuing general importance that warrants the attention of this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.

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[3]The construction in Navarre Marsh of the Davis-Besse plant has been the subject of separate litigation under NEPA. See *Coalition For Safe Nuclear Power and Living in a Finer Environment* v. *Atomic Energy Commission*, C.A.D.C., No. 71-1396, appeal dismissed, December 27, 1972.